

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re U.S. Patent No. 7,396,602)	
)	
Issue Date: July 8, 2008)	Group Art Unit: 1795
)	
Inventor: Antonino TORO)	Examiner: Thomas H. Parsons
)	
Application No.: 10/536,561)	Conf. No. 9936
)	
Filed: May 25, 2005)	
)	
For: ELECTROCHEMICAL)	
GENERATOR AND METHOD)	
FOR ITS UTILISATION)	

Mail Stop Petition

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

**PETITION UNDER 37 C.F.R. § 1.183 FOR WAIVER
OF THE REQUIREMENT UNDER 37 C.F.R. § 1.705(d)**

Pursuant to 37 C.F.R. § 1.183, Patentee petitions the Commissioner to waive the requirements of 37 C.F.R. § 1.705(d) that any request for reconsideration of the patent term adjustment indicated in an issued patent must be filed within two months of the date the patent issues. The required fee of \$400.00 for the petition under 37 C.F.R. § 1.183 is enclosed.

The U.S. Patent Trademark Office (USPTO) issued the above-referenced U.S. Patent No. 7,396,602 (the '602 patent) on July 8, 2008, with a patent term adjustment (PTA) of 350 days. Subsequently, on September 30, 2008, U.S. District Court for the

District of Columbia ruled in *Wyeth v. Dudas* that the USPTO had made an error in the manner it determined PTA. Specifically, the court's decision relates to situations in which separate time periods of PTA accrue due to PTO examination delay and those time periods do not overlap. The court ruled that in such situations, the PTA should be determined as the sum of the term adjustments of the respective separate time periods, rather than the greater one of the term adjustments, the latter practice being the PTO's manner of PTA determination used to date.

Patentee requests waiver of Rule 1.705(d) to permit filing and consideration of the accompanying Determination of Patent Term Adjustment - Post Grant, in which patentee requests a change in the PTA based on determination in a manner consistent with the court's decision referred to above.

This Petition is accompanied by the required petition fee of \$400.00, as set forth in 37 C.F.R. § 1.17(f). If there are any other fees due in connection with the filing of this Petition, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

By:



Mark D. Sweet
Reg. No. 41,469

Dated: December 31, 2008

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**Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450**

Sir:

DETERMINATION OF PATENT TERM ADJUSTMENT - POST GRANT

The U.S. Patent and Trademark Office (USPTO) issued the subject U.S. Patent No. 7,396,602 (the '602 patent) on July 8, 2008, with a patent term adjustment (PTA) of 350 days. The application was filed on May 25, 2005. The USPTO reached the PTA of 350 days in view of a 379 day PTO delay to issue the first notification under 35 U.S.C. § 132 (dated August 8, 2007), and an Applicant delay of 29 days from the mailing of the Non-Final Rejection on August 8, 2007, to their Response dated December 27, 2007. See the Issue Notification dated June 18, 2008.

Thus, 44 days of USPTO delay accrued after the application had been pending for three years (between the third year anniversary date May 26, 2008, and the issuance of the patent on July 8, 2008). Under the PTO's manner of calculating PTA, applicants were not provided those additional 44 days of PTO delay in the PTA.

In view of the decision of the Federal District Court for the District of Columbia in Wyeth v. Dudas on September 30, 2008, patentee submits it is entitled to a total patent term adjustment of 394 days which is the sum of 44 days of patent term adjustment due to exceeding three year pendency accrued at the time the patent issued and 350 days resulting from the 379 day PTO delay to issue the first notification under 35 U.S.C. § 132 minus Applicant's 29 day patent term adjustment delay. The 44 days exceeding the three year pendency did not actually overlap with any of the earlier 350 day PTO delay.

If there are any fees due in connection with the filing of this request, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

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